

IV. SECOND ISSUE—CONNECTION OF ACTS WITH AUTHORIZED CONDUCT [§29.4]

4. If you decide that *[the defendant employee]* was the employee of *[the defendant employer]*, you must go on to decide a second issue. You must decide whether, in the circumstances, *[the defendant employer]* should be liable for the harm that occurred. You must determine whether the wrong committed was so closely connected with the employer's enterprise that the employer should be held liable. In other words, did *[the defendant employer]* significantly increase the risk of harm by putting *[the defendant employee]* in (his/her/their) position and requiring (him/her/them) to perform the assigned tasks? Some factors that you should consider in making that determination include:
 - (1) Did *[the defendant employer's]* enterprise give *[the defendant employee]* the opportunity to commit the wrongful acts alleged?
 - (2) Was it more likely such wrongful acts would be committed because they possibly would further *[the defendant employer's]* aims?
 - (3) Did *[the defendant employer]* put *[the defendant employee]* into a position of friction, confrontation, or intimacy by asking (him/her/them) to perform certain employment duties?
 - (4) Was *[the defendant employee]* given power over *[the plaintiff]*?
 - (5) How vulnerable were persons in the position of the plaintiff *[e.g., residents in the group home/ clients/ patients]* to abuse of power by *[the defendant employee]*?

You must determine whether there was a close connection between the wrongful act and the power that *[the defendant employer]* gave to *[the defendant employee]* to do the work (he/she/they) (was/were) required to do. Did *[the defendant employer]* significantly increase the risk of harm to *[the plaintiff]*? If you conclude that the answer is "yes", you may find *[the defendant employer]* vicariously liable, in addition to finding *[the defendant employee]* directly liable.

| **User Note:** Review evidence relating to the connection.

NOTES

- 1 See *C.D. v. Mostowy*, 2021 BCSC 1920 at para. 23, where a company was held vicariously liable for a sexual assault committed by its sole director; *H.N. v. School District No. 61 (Greater Victoria)*, 2025 BCCA 144, where a school district was vicariously liable for sexual abuse committed by an individual who volunteered at a school; and *Gichuru v. Purewal*, 2019 BCSC 731, where a mother was held vicariously liable for the defamatory statements of her son, where the son acted as her agent when he performed landlord duties on her behalf.
- 2 *Gichuru v. Purewal* at para. 43, citing *K.L.B. v. British Columbia*, 2003 SCC 51 at para. 19.
- 3 See also chapter 30 (Employer and Employee—Negligence of Employee Toward Third Party—CIVJI 6.02).

The principles governing vicarious liability for sexual assaults by employees, and for unauthorized intentional wrongful acts by employees in general, were considered by the Supreme Court of Canada in two companion cases.

In *P.A.B. v. Children's Foundation (sub nom. Bazley v. Curry)*, 1999 CanLII 692 (SCC) ("Bazley"), the court upheld the imposition of vicarious liability on a non-profit organization that operated residential care facilities for troubled children, where an employee who was a pedophile had sexually abused children in his care. The court reviewed the traditional test set out in *Salmond and Heuston on the Law of Torts*, 21st ed., R.F.V. Heuston and R.A. Buckley (Eds.) (Sweet & Maxwell, 1996) at 443–44, which posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. The case focuses on the interpretation of the second aspect of the test.

The court stated that the second aspect of the test can be approached in two steps:

- (1) Are there previously decided cases on similar facts?
- (2) Where precedent does not determine the issue, should liability be imposed as a matter of policy?

Rather than trying to tailor the facts into discussions of "scope of employment" and "mode of conduct", the court should determine whether liability should be imposed for the two policy reasons of fair compensation and deterrence. For the imposition of liability on the employer to be seen as fair, the employer must be seen to have put the risk into the community to further the employer's enterprise. Deterrence will be possible when the wrong is closely and materially related to the risk introduced by the employer, and is not only coincidentally linked to the employer's enterprise.

The court summarized at para. 41: